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In The
Supreme Court of the United States

BORDEN RANCH PARTNERSHIP and
ANGELO K. TSAKOPOULOS,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS
and UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL WILDLIFE FEDERATION, SIERRA CLUB, NATURAL RESOURCES DEFENSE COUNCIL, AND NATIONAL AUDUBON SOCIETY IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

National Wildlife Federation, Sierra Club, Natural Resources Defense Council, and National Audubon Society all have a long history of involvement in, and expertise concerning, the protection of our Nation's waters and the implementation of the Clean Water Act. Through testimony in Congress, comments and other advocacy in the Executive Branch, and litigation in the courts, they have pursued these interests repeatedly during the three decades since enactment of the seminal 1972 amendments that gave the Act its current structure. All of these organizations have members who use and rely on a wide array of waters throughout our Nation for recreation, scientific study, and protection of their health, safety, property, drinking water, and food supply.[1]

STATEMENT OF THE CASE

Introductory Statement

The arguments made by petitioners and their *amici* pose a profound danger to the future of the Clean Water Act and the precious waters it protects. Those arguments seek nothing less than the power to destroy outright and to severely degrade waters – not "isolated" ponds like those at issue in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), but "waters of the United States" that are

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[1] Pursuant to S. Ct. R. 37.3(a) and 37.6, the undersigned represents that (1) all parties consented to the filing of this brief, (2) no counsel for any party authored this brief in whole or in part, and (3) no person or entity other than the above-named *amici curiae* and their counsel made a monetary contribution to the preparation or submission of this brief.

undisputedly within the jurisdiction of the Act's permit program. *See* § 502(7), 33 U.S.C. § 1362(7).

Petitioners' arguments threaten to reach well beyond the circumstances of this case in at least two respects. First, the **geographic** scope of those arguments is extremely broad, addressing cross-cutting statutory terms like "discharge," "point source," "pollutant," and "addition," § 502, 33 U.S.C. § 1362, and the exemptions in § 404(f)(1), 33 U.S.C. § 1344(f)(1) – each of which applies, not simply to certain subsets of "waters of the United States," but to **all** of them. Thus, petitioners' arguments, if accepted, threaten destruction of and damage to not only intermittent swales and streams like those located on Borden Ranch, but also perennial streams, rivers, lakes, coastal bays and estuaries – as well as wetlands adjoining them.

Second, the **activities** potentially exempted by those arguments are likewise wide-ranging. The key statutory terms "discharge," "point source," "pollutant," and "addition" do not apply solely to agricultural activities, but also to all other activities regulated by the Act's permit programs – including the § 404 program administered by the Corps as well as the § 402 program administered by the Environmental Protection Agency. 33 U.S.C. §§ 1344, 1342. Thus, petitioners' arguments raise the specter of wholesale destruction of waters through mining, development of shopping malls and subdivisions, channelization, roadbuilding and other infrastructure projects – a prospect underscored by the presence in this case of *amici* from many of those industries.

Even considering only agriculture, petitioners' arguments are troubling enough. Petitioners untenably claim that the Act's agricultural provisions allow unpermitted destruction of United States waters by conversion to dry land – here, from ranched wetlands to upland crops. This

approach would allow wholesale conversions of wetlands without a permit – an alarming prospect, given that the conversion of wetlands to cropland has been the primary source of wetland loss in the United States. U.S. Fish and Wildlife Service, "Status and Trends of Wetlands and Deepwater Habitats in the Conterminous United States, 1950's to 1970's" (1983) ("1983 Wetland Trends Report") at 3, 26; U.S. Fish and Wildlife Service, "Status and Trends of Wetlands in the Conterminous United States, 1986 to 1987" (2000) ("2000 Wetland Trends Report"), at 29. Indeed, under petitioners' theory, even **developers** could escape regulation by first converting wetlands to upland crops (so they are no longer regulated waters of the United States), then developing them for nonagricultural uses.

An interpretation of the Act authorizing unpermitted wholesale destruction and degradation of rivers, streams, bays, estuaries, lakes, and their adjacent wetlands would turn on its head Congress's intent that the Act serve as a "comprehensive legislative attempt 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *United States v. Riverside Bayview Homes*, 474 U.S. 121, 132 (1985) (quoting CWA § 101(a), 33 U.S.C. § 1251(a)). "Integrity" means "a condition in which the natural structure and function of ecosystems is **maintained**," *id.* (emphasis added; internal quotations omitted) (quoting legislative history) – not destroyed. With half of our wetlands already lost, and tens of thousands of acres more being lost each year, 2000 Wetland Trends Report at 9, and with our streams and rivers under constant assault from channelization, mining, and other damaging activities, Corps of Engineers, Draft Nationwide Permits Programmatic Environmental Impact Statement (July 2001), at App. F, the need for the Act's protection remains urgent indeed.

The Act's substantive provisions, far from supporting petitioners' attempt to undermine the statutory purposes under the guise of interpretation, conclusively refute that attempt. In keeping with Congress's recognition that "[p]rotection of aquatic ecosystems . . . demanded broad federal authority to control pollution," *Riverside Bayview*, 474 U.S. at 132-33, the 1972 Act enacted a comprehensive ban on unpermitted point source discharges, using broad definitions that plainly encompass the facts of this case. Far from undermining the broad reach of those definitions, the 1977 amendments expressly **confirmed** their applicability to agriculture.

The Clean Water Act

1972 Act. At the core of the Act since 1972 has been a basic prohibition: "the discharge of **any** pollutant by **any** person shall be unlawful" except as provided in enumerated sections of the Act. § 301(a), 33 U.S.C. § 1311(a) (emphasis added). To emphasize the wide scope of this prohibition, Congress included several key definitions in the Act. For example,

> • "discharge of a pollutant" is defined as *inter alia* "**any** addition of **any** pollutant to navigable waters from **any** point source," § 502(12), 33 U.S.C. § 1362(12) (emphasis added);
>
> • "pollutant" is defined to include *inter alia* "dredged spoil," "rock," "sand," "cellar dirt," and "biological materials," § 502(6); and
>
> • "point source" is defined as "**any** discernible, confined and discrete conveyance, including but not limited to **any** pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged," § 502(14) (emphasis added).

The Act offers two primary paths for seeking a waiver of § 301(a)'s broad prohibition on discharge. For most discharges, a permit may be sought from EPA pursuant to § 402, 33 U.S.C. § 1342. In the case of "the discharge of dredged or fill material," however, Congress assigned permitting authority to the Corps of Engineers. § 404(a), 33 U.S.C. § 1344(a).

1977 Amendments. Stressing the urgent need for protection of wetlands,[2] Congress in 1977 rejected attempts to limit the scope of waters covered by the Act. *Riverside Bayview*, 474 U.S. at 136-37. Instead, Congress enacted narrowly drawn – and conditional – exemptions targeted at specific activities. In particular, Congress provided that, with specified exceptions, no permit under either § 404 or § 402 would be required for (*inter alia*) the discharge of dredged or fill material "from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices." § 404(f)(1)(A). The drafters cautioned that "[t]he exemption for minor drainage does **not** apply to the drainage of swampland or other

---

[2] *See, e.g.*, Cong. Research Service, A Legislative History of the Clean Water Act of 1977 (Oct. 1978) ("1977 Legis. Hist."), at 644 (Senate Report: "The wetlands and bays, estuaries and deltas are the Nation's most biologically active areas," and "[t]here is no question that the systematic destruction of the Nation's wetlands is causing serious, permanent ecological damage."). *Accord*, *id.* 923 (Sen. Baker), 916-19 (Sen. Chafee); 882 (Sen. Stafford); 869-70 (Sen. Muskie); 549 (Sen. Moynihan); 908-09 (Sen. Hart); 417-18 (Cong. Dingell); 413 (Cong. Lehman).

wetlands." 1977 Legis. Hist. at 709 (Senate Report) (emphasis added).

The activities enumerated in § 404(f)(1) were not completely exempted from the permit requirement. First, the exemption does not relieve dischargers of the obligation to obtain a permit for releases of toxic pollutants covered by Clean Water Act § 307, 33 U.S.C. § 1317. § 404(f)(1) (the enumerated discharges are not regulated under §§ 404, 402, or 301(a) "**except** for effluent standards or prohibitions under section 1317 of this title") (emphasis added).

Second, **[a]ny** discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, **shall be required to have a permit under this section**." § 404(f)(2) (emphasis added).

In short, Congress's intent was to exempt only "those narrowly defined activities that cause little or no adverse effects either individually or cumulatively." 1977 Legis. Hist. at 474 (Sen. Muskie). *Accord*, *id.* 420 (Cong. Harsha), 529 (Sen. Wallop).

Borden Ranch

In this case, petitioners used heavy earthmoving equipment on a California ranch to destroy some United States waters and seriously impair others. At issue are swales, "sloped wetlands that allow for the movement of aquatic plant and animal life, and that filter water flows and minimize erosion," and intermittent drainages, "streams that transport water during and after rains." Pet. App. 2 (Ninth Circuit). Water from the swales flowed

through the intermittent streams to Goose Creek and Dry Creek, and then to the Cosumnes and Mokelumne Rivers. District Court findings, Pet. App. 68-69, 86-92; Dec. of Dr. Lyndon C. Lee, Supplemental Excerpts of Record ("SER") 126-27. These swales and streams all "depend upon a dense layer of soil, called a 'restrictive layer' or 'clay pan,' which prevents surface water from penetrating deeply into the soil." Pet. App. 2 (Ninth Circuit).

Petitioners used at least two kinds of rolling stock – bulldozers and tractors equipped with prongs, discs, and rollers, *see* Pet. App. 9, SER 129 – to destroy and impair these waters. These devices –

> • Pushed dirt into the swales and streams from surrounding upland areas. *See*, *e.g.*, District Court findings, Pet. App. 83 (Corps official found that "[s]oil was moved **into** a number of these drainages by turning equipment") (emphasis added), 89 ("The upper swale portions have been partially filled due to deep rippers plowing **to the edge of the feature** and depositing soil **into** the swale.") (emphasis added); *id.* (in another swale, "due to proximate deep ripping, a small amount of fill material has been deposited"); 87, 90, 92 (ripping moved "through" or "across" various swales and streams, indicating that soil was dragged perpendicularly into them from outside); Lee Dec., SER 129 (expert whom the district court found to be the "most thorough" [Pet. App. 86] found that "[t]he bulldozers and tractors and attached rippers, discs, and rollers carry and drag along large clods of dirt and biological material such as plant stems and roots from surrounding **upland** areas **into** the . . . swales . . . and intermittent streams") (emphasis added).
>
> • Broke up the subsurface hardpan layer, thereby depriving the swales and streams of

their capacity to hold water – i.e., **draining** them. Pet. App. 8 (Ninth Circuit: "by ripping up the bottom layer of soil, the water that was trapped can now **drain** out") (emphasis added).

• Excavated soil from within the swales and streams and dragged it laterally to a new location. *Id.* 3, 8 ("soil . . . is . . . dragged behind the ripper," and was "wrenched up, **moved around**, and redeposited **somewhere else**") (emphasis added); District Court findings, Pet. App. 70 (deep ripping "**mov[ed]** earth, rock, sand, and biological matter both **horizontally** and vertically") (emphasis added). *Accord*, Lee Dec., SER 128-129.

• Deposited soil in 28 swales and streams, Pet. App. 86 (district court), filling many of them completely and many others partially. *Id.* 86-88, 91-92.

• Converted areas of United States waters to dry land by "completely obliterat[ing]" at least eight of the swales and streams, and "nearly completely obliterat[ing]" or otherwise damaging others. Pet. App. 106, 86-92 (district court). *See also* Lee Dec., SER 128-29, 132; Pet. App. 10 (Ninth Circuit: petitioners' activities "radically altered the hydrological regime of the protected wetlands").

SUMMARY OF ARGUMENT

The plain meaning of the Act compels the conclusion that petitioners' activities fall within the Act's permit program, whose applicability is defined by broad statutory definitions – without any exemptions for agricultural activities of the kind at issue here. The wheeled earthmoving equipment used by petitioners constitutes "point sources," which are statutorily defined to include "any . . . rolling stock," and more broadly "any discernible, confined

and discrete conveyance." The earth discharged contains several components statutorily defined as "pollutants," including "rock," "sand," "cellar dirt," and "biological materials" – and also constitutes "dredged material" and "fill material."

Petitioners' activities encompass the "discharge" – *i.e.*, "addition" – of pollutants to United States waters. First, petitioners moved earth into those waters from uplands. Second, they excavated earth within United States waters, moved it around, and redeposited it at other locations within those waters. Given that "dredged material" inherently is material excavated **from United States waters**, the "addition" requirement is plainly met by such redeposits.

Section 404's agricultural exemption, which applies only to activities whose environmental effects are minor individually and cumulatively, such as "**minor** drainage," excludes the conversion of ranched wetlands to farmed uplands.

ARGUMENT

Petitioners argue that agriculture is exempt from point source regulation generally, and alternatively, that the earthmoving activities at issue are exempt from the Act's permit requirements because they allegedly fall outside various key statutory definitions ("point source," "pollutant," and "discharge"), and are within the scope of the § 404(f) exemption enacted by Congress in 1977. Each of these arguments is refuted by the plain meaning of the Act.

I. CONGRESS ENACTED NO BLANKET AGRICULTURAL EXCLUSION FROM POINT SOURCE PERMIT REQUIREMENTS.

Petitioners argue broadly that "Congress intentionally excluded agriculture from Section 404 regulation." Pet. Br.

27 (initial caps omitted). To the contrary, as discussed in Parts II-IV below, the 1972 Act enacted broad definitions that on their face **include** agricultural point sources. Indeed, Congress repeatedly prefaced these key provisions with the word "any," *see* pp. 4-5, *supra* (quoting Act), thereby emphasizing their comprehensive scope. *See, e.g.*, *Dept. of HUD v. Rucker*, 122 S. Ct. 1230, 1233 (2002) ("the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind' ").

Far from inviting implicit exclusions from these definitions, the drafters expressly emphasized their importance, and cautioned against attempts to narrow them. *See, e.g.*, Cong. Research Service, A Legislative History of the Water Pollution Control Act Amendments of 1972 (Jan. 1973) ("1972 Legis. Hist."), at 762 (House Report: "[C]ertain terms used in the drafting of this section [i.e., § 2, which contained §§ 301 and 404] have **very specific and technical meanings**. The definitions of these terms are included in section 502 of title V, and it is recommended that very special attention be accorded section 502.") (emphasis added); 356 (Cong. Blatnik, committee chair: "If there is a part of this bill that can be labeled 'most important,' it is these definitions. **To revise them in a way to limit their coverage is to severely detract from the effectiveness of the bill**.") (emphasis added). *See also id.* 651-53 (**rejecting** proposed amendment seeking to exempt agricultural irrigation from point source regulation).

Indeed, discussing its 1975 regulations that had established some agricultural exemptions, the Corps in 1977 cautioned that "many interpreted this language as an exclusion of all practices by the farming and forestry industry including those that **do** involve discharges of dredged or fill material into water. **The FWPCA does not allow us to make such an exemption or exclusion for**

any industry." 42 Fed. Reg. 37130 (July 19, 1977) (emphasis added).

Subsequently, Congress carefully calibrated the applicability of the Act's permit requirements to agriculture, enacting in 1977 a provision – § 404(f) – that addressed the issue in detail. Petitioners untenably claim that § 404(f) represents a "belt and suspenders" approach to clarifying the **exclusion** of plowing and other normal farming activities from § 404 regulation. Pet. Br. 37-38. To the contrary, Congress knew full well how to carve out exclusions from the Act's key definitions governing the applicability of the point source discharge program – and indeed the 1977 Amendments that enacted § 404(f) included such a provision. Pub. L. 95-217, § 33(b), 91 Stat. 1577 (Dec. 27, 1977) (amending the "point source" definition in § 502(14) to exclude irrigation return flows).[3] Section 404(f) carves out no such exclusion for plowing or other agricultural earthmoving activities.

To the contrary, § 404(f) expressly references "the **discharge of dredged or fill material** . . . from normal farming, silviculture, and ranching activities such as **plowing**," § 404(f)(1)(A) (emphasis added), thus confirming Congress's understanding that plowing and other agricultural activities can produce discharges. Moreover, while § 404(f) includes **limited** exemptions for such agricultural discharges, it also expressly provides – in each of its two subparagraphs – that discharges associated with **all** of the listed activities, including plowing, **are**

[3] *See also* §§ 502(14) (additional amendment, enacted in 1987, excluded agricultural stormwater from definition of "point source"), 502(6) (certain military and oil-and-gas activities excluded from definition of "pollutant"), 502(12)(B) (ocean vessels excluded from definition of "discharge of a pollutant").

subject to permit requirements in specified circumstances. *See* pp. 5-6, *supra*. Considering this amendment, the D.C. Circuit, in a decision praised by petitioners (at 22) as "persuasive," expressly indicated that "**plowing** . . . may . . . produce actual discharges, i.e., **additions** of pollutants." *Natl. Mining Assn. v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1405 (D.C. Cir. 1998) (emphasis added).

II. THE ROLLING STOCK USED BY PETITIONERS ARE "POINT SOURCES."

The wheeled equipment at issue here plainly constitutes point sources under the Act. The statutory definition expressly encompasses "any . . . rolling stock." § 502(14). Petitioners creatively attempt to equate bulldozers and tractors with draft animals such as "horses and oxen," Pet. Br. 26, but of course the latter walk on hooves, while the former **roll** on wheels.

While the express statutory reference to "rolling stock" suffices to resolve the matter, the earthmoving equipment at issue here also fits comfortably within the broader statutory phrase "any discernible, confined and discrete conveyance" – indeed, the record documents, and petitioner does not dispute (Pet. Br. 21), that the equipment conveyed earth both vertically and laterally. *See* pp. 7-8, *supra*. Reinforcing the clear import of the statutory text, the legislative history cautions that agency implementation "should not ignore discharges resulting from point sources **other than** pipelines or similar conduits. . . . There are many other forms of periodic, though frequent, discharges of pollutants into the water through point sources such as barges, vessels, feedlots, **trucks and other conveyances**." 1972 Legis. Hist. at 1469 (Senate Report) (emphasis added).

That earthmoving equipment constitutes point sources is further confirmed by § 404(f), which enumerates various activities (including plowing as well as the construction and maintenance of infrastructure including ditches, roads, and sedimentation basins) that are expressly subjected to point source permitting requirements in specified circumstances. *See* pp. 5-6, *supra* (quoting § 404(f)(1) and (2)). Because most of the enumerated activities are conducted with earthmoving equipment, § 404(f)'s language expressly applying point source permitting requirements to those activities further confirms that such equipment constitutes point sources.

The Fifth Circuit long ago held that "bulldozers" equipped with "blades" constitute point sources, and petitioners do not claim that case was wrongly decided. Pet. Br. 26 and n.16 (discussing *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897 (5th Cir. 1983)). There is no basis in § 502(14) for distinguishing between that equipment and the bulldozers and tractors at issue here, which were likewise equipped with metal earthmoving attachments, and which used those attachments to excavate, move and relocate, and grade soil. *Cf.* Pet. Br. 26 (erroneously asserting that the Borden Ranch equipment did not excavate or grade).

Petitioners' suggestion (at 26) that the activities at issue here are not "major" enough to constitute point source discharges ignores the district court's express findings that those activities destroyed numerous United States waters and damaged others. *See* pp. 7-8, *supra*. Moreover, the Act's point source program does not apply only to "major" discharges. *See, e.g., Minnehaha Creek Watershed District v. Hoffman*, 597 F.2d 617, 626-27 (8th Cir. 1979). To the contrary, the Act expressly requires regulation of discharges that are "incidental," § 404(f)(2) – *i.e.*, an "unpredictable or **minor** accompaniment," or "[o]f a

minor, casual, or subordinate nature." Am. Heritage Dict. (4th ed. 2000) (emphasis added). Activities whose impacts (unlike those here) are truly "minimal" may qualify for a **general** permit, § 404(e), but not for outright exemption from **any** permit.

Petitioners further argue (at 25 n.14) that the earthmoving equipment is not covered because the word "plow" does not appear in § 502(14). First, § 502(14) uses the broad phrases "**any** . . . rolling stock" and "**any** discernible, confined and discrete conveyance" (emphasis added), with no suggestion that only certain **kinds** of rolling stock and conveyances are covered. *See* p. 10, *supra* (citing caselaw on use of word "any"). Second, Congress clearly knew how to carve out exemptions from the point source definition, having done so in two separate amendments – in 1977 for "return flows from irrigated agriculture" and in 1987 for "agricultural stormwater discharges." § 502(14). Under basic principles of statutory interpretation, the existence of those exemptions undercuts rather than supports petitioners' efforts to imply additional exemptions for the earthmoving equipment at issue here. *TRW v. Andrews*, 122 S. Ct. 441, 447 (2001). *Cf.* Pet. Br. 26 (erroneously arguing the contrary). Third, even if the equipment at issue could be considered "plows," § 404(f) expressly confirms the applicability of the Act's point source provisions to "plowing." *See* pp. 5-6, 11-12, *supra*.

Petitioners argue (at 26) that it would be the "height of irrationality" for Congress to exclude surface runoff from the Act's permit program, while regulating discharges from earthmoving equipment. To the contrary, Congress's decision to focus the Act's permit program on point source discharges, while leaving surface runoff to other mechanisms, lies at the heart of the 1972 Act. It is common, and not irrational, for legislation to take a

stepwise approach to a problem. *See, e.g., Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955).

III. THE MATERIAL DISCHARGED BY PETITIONERS CONSTITUTES "POLLUTANTS."

Straying beyond the issues presented by their petition, petitioners argue (at 23-24) that the soil discharged by the earthmoving equipment does not constitute a "pollutant" within the meaning of the Act. To the contrary, the drafters of the 1972 Act recognized that "[s]ediment, often associated with agricultural activities, is by volume **our major pollutant**." 1972 Legis. Hist 1470 (Senate Report) (emphasis added). Indeed, soil contains several items listed in the § 502(6) definition of "pollutant," including "rock," "sand," and "cellar dirt" – as well as "biological materials" in the form of organisms and detritus found underground, and plants growing on the surface. *See also United States v. Deaton*, 209 F.3d 331, 336 (4th Cir. 2000) ("plain dirt" is pollutant).

Moreover, § 502(6) also encompasses "dredged spoil," synonymous with the term "dredged . . . material" used in § 404(a), which in turn has been defined regulatorily as "material that is **excavated** or dredged from waters of the United States." 33 C.F.R. § 323.2(c) (emphasis added). The material that was excavated from the swales and streams on Borden Ranch clearly falls within this description.

In addition to dredged material, § 404(a) also encompasses "fill material," defined regulatorily – at the time of the actions at issue here – as "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody." 33 C.F.R. § 323.2(e). *See also* 1977 Legis. Hist. 707 (Senate committee where § 404(f) originated emphasized that the adverse effects of § 404 discharges include "the destruction

and degradation of aquatic resources that results from replacing water with dredged material or fill material"). The primary purpose of the activity at issue here was to replace swales and streams with dry land, and change their bottom elevation, so that they could be planted with crops. *See, e.g., Avoyelles*, 715 F.2d at 924-25 (under circumstances analogous to those here, court held that material constituted "fill material" under the above definition).[4]

Petitioners argue (at 24) that soil is not a pollutant because it is not "waste." However, "rock," "sand," "cellar dirt," "biological materials," and "dredged or fill material" are pollutants under the Act – regardless of whether they are being disposed of to discard waste material or for some other purpose. *See, e.g., Minnehaha*, 597 F.2d at 627 ("We . . . find no justification in the Act for the District Court's determination that whether the discharge of a particular substance listed in § 502(6) constitutes the discharge of a 'pollutant' under the Act depends upon the purpose for which the discharge is made.").

[4] The court decision cited by petitioners (at 22) unpersuasively indicates that, where material is deposited in order to replace United States waters or change their bottom elevation, and where that activity is undertaken in order to facilitate a subsequent use (in that case a landfill), it is the subsequent use, not the replacement or changed elevation of waters, that is the "primary purpose." *Resource Investments v. U.S. Army Corps of Engineers*, 151 F.3d 1162, 1168 (9th Cir. 1998). The intentional replacement of United States waters, and the intentional change of their bottom elevation, are virtually always undertaken to facilitate some subsequent use. To define that subsequent use as the "primary purpose" would eliminate or drastically reduce the applicability of the definition.

IV. PETITIONERS "ADDED" POLLUTANTS TO UNITED STATES WATERS.

Noting the Act's definition of discharge as any "addition" of any pollutant to United States waters, § 502(12), petitioners argue (at 21-23) that they "added" no pollutants to the Borden Ranch swales and streams. They are wrong.

A. Petitioners Added Pollutants Drawn From Uplands.

The district court found that petitioners' equipment conveyed earth from **outside** United States waters (*i.e.*, from the upland areas of Borden Ranch) **into** those waters (*i.e.*, into the swales and streams). *See* p. 7, *supra*. Petitioners do not and could not explain how taking pollutants from uplands and placing them into United States waters is not an "addition." *See, e.g., Rybachek v. USEPA*, 904 F.2d 1276, 1285 (9th Cir. 1990) (if "the material discharged is coming **not from the streambed itself, but from outside it, this clearly constitutes an 'addition.'**") (emphasis added).

Confronted with this fundamental flaw in their "addition" argument, petitioners change the subject, arguing (at 22) that the material at issue is not "fill material." For reasons already stated, they are wrong. But even if they were correct, the material would still contain "rock," "sand," "cellar dirt," and "biological materials" – and thus would still be a "pollutant" within the meaning of the Act. § 502(6). Section 301(a) bans "the discharge of **any** pollutant" (emphasis added), not just some of them. Thus, regardless of whether a given pollutant constitutes "dredged or fill material" within the meaning of § 404(a), its discharge falls within the § 301(a) prohibition.

B. Petitioners Added Pollutants Drawn From United States Waters.

Petitioners also added pollutants by excavating earth from the swales and streams, and relocating that material to various other places within those features. That relocation constitutes an "addition" under every appellate decision to consider the issue – **including the *National Mining* decision that petitioners characterize (at 22) as "persuasive."** Indeed, *National Mining* expressly concluded that "**plowing** ... may ... produce actual discharges, i.e., **additions** of pollutants." *National Mining*, 145 F.3d at 1405 (emphasis added). *See also United States v. Deaton*, 209 F.3d 331 (4th Cir. 2000); *United States v. M.C.C.*, 772 F.2d 1501 (11th Cir. 1985), *vacated on other grounds*, 481 U.S. 1034 (1987), *"redeposit" analysis reaffirmed*, 848 F.2d 1133 (11th Cir. 1988), *modified on other grounds*, 863 F.2d 802 (11th Cir. 1989); *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897 (5th Cir. 1983).

This conclusion is compelled by the plain language of the Act, which grants the Corps permit jurisdiction over *inter alia* discharges of "dredged ... material" – *i.e.*, "material that is excavated or dredged **from waters of the United States**." 33 C.F.R. § 323.2(c) (emphasis added). As Senator Ellender observed, in introducing the floor amendment that first proposed assigning dredged material permitting authority to the Corps: "The disposal of dredged material does **not** involve the introduction of **new** pollutants; it merely **moves the material from one location to another**." 1972 Legis. Hist. at 1386 (emphasis added). *Accord*, *id.* 1387 (Sen. Ellender: "**moving** spoil material from **one place in the waterway to another, without** the interjection of **new** pollutants") (emphasis added). Thus, the Fifth Circuit long ago noted that pollutants need not "come from an external source in order to

constitute a discharge," because "'dredged' material is by definition material that comes from the water itself. A requirement that all pollutants must come from outside sources **would effectively remove the dredge-and-fill provision from the statute**." *Avoyelles*, 715 F.2d at 924 n.43 (emphasis added).

Petitioners apparently believe that the statutory term "addition" must be interpreted more narrowly for agriculture, such that "plowing" can never involve an addition. *See* Pet. Br. 21. But neither § 502(12) nor any other provision of the Act supports that interpretation. To the contrary, § 404(f) expressly indicates that plowing and other normal agricultural activities can involve discharges, and that such discharges are subject to the Act's permit program in specified circumstances. *See* pp. 5-6, 11-12, *supra* (quoting § 404(f)).

Petitioners' reading of "addition" would flout not only the plain meaning of the Act's substantive provisions, but also the Act's central **purpose** of restoring and maintaining the integrity of United States waters. *See* p. 3, *supra* (quoting § 101(a)). The environmental impacts Congress intended § 404 to address include "the destruction and degradation of aquatic resources that results from replacing water with dredged material or fill material," and "the contamination of water resources with dredged or fill material that contains toxic substances." 1977 Legis. Hist. at 707 (Senate Report). Such impacts "are no less harmful when the dredged spoil is redeposited in the same wetland from which it was excavated. The effects on hydrology and the environment are the same." *Deaton*, 209 F.3d at 336.

Petitioners' recourse to the caselaw is equally unavailing. They characterize as "persuasive" the D.C. Circuit's decision in *National Mining*. Pet. Br. 22. However, that decision rests on the untenable notion that "there can be

[no] . . . addition of **dredged material** when there is no addition of **material**." 145 F.3d at 1404 (emphasis in original). As the Fifth Circuit made clear in *Avoyelles*, the discharge of dredged material **inherently** involves material drawn from United States waters. *See* pp. 18-19, *supra*. Likewise, the Fourth Circuit considered but **rejected** *National Mining*'s fundamental rationale: "The idea that there could be an addition of a pollutant **without** an addition of material **seems to us entirely unremarkable**, at least when an activity transforms some material from a nonpollutant into a pollutant, as occurred here." *Deaton*, 209 F.3d at 335 (emphasis added).

Because *National Mining* could not deny that **some** redeposits are properly subject to regulation, 145 F.3d at 1405, 1407, it sought to distinguish between redeposits based on their size and their distance from the point of excavation. Specifically, it held that the Act's permit requirement does not encompass "incidental fallback," which occurs when "material is removed from the waters of the United States and a **small portion** of it happens to fall back," "**virtually to the spot from which it came**." 145 F.3d at 1404, 1403 (emphasis added). Such tests, however, have no basis in the text or environmental goals of the Act. To the contrary, when soil is excavated, serious harm to United States waters can result, regardless of whether it is relocated horizontally before being redeposited. *See Deaton*, 209 F.3d at 336; *United States v. Wilson*, 133 F.3d 251, 273-74 (4th Cir. 1997) (separate opinion of Payne, J.).

Even assuming the correctness of *National Mining*, that decision fully supports regulation of the discharges at issue here, which are a far cry from the incidental fallback at issue there. First, here the material redeposited into the Borden Ranch swales and streams encompassed not merely a "small portion" of the material excavated, but

virtually all of it. Second, instead of falling back "virtually to the spot from which it came," 145 F.3d at 1403, here "soil was wrenched up, **moved** around, and redeposited **somewhere else**." Pet. Br. 21 (quoting Ninth Circuit opinion) (emphasis added).

Indeed, *National Mining* expressly confirmed that it did not intend to question the regulation of "redeposits at **some distance** from the point of removal." 145 F.3d at 1407 (emphasis added). The amount of relocation the *National Mining* court considered sufficient to trigger § 404 jurisdiction was minimal. *Id.* 1407, 1402 (confirming that the court was not questioning § 404 jurisdiction over "sidecasting," a practice that "involves placing removed soil . . . **by the side of an excavated ditch**") (emphasis added). *Accord*, *Deaton*, 209 F.3d at 333, 335-37 (relocation from a ditch to the sides of the ditch); *M.C.C.*, 772 F.2d at 1505-06 (relocation from navigation channel to adjacent sea grass beds). That minimal relocation test is clearly met here – and indeed, as indicated above, *National Mining* expressly confirmed that **plowing** suffices to constitute an addition. *Id.* 1405.

The other arguments offered by petitioners are equally meritless. First, even if the material excavated by petitioners "never loses contact with the immediately-surrounding ground," Pet. Br. 21, it still was excavated and moved to a different location. Appellate courts have repeatedly applied § 404 to movements of pollutants that never left United States waters. *See, e.g.*, *M.C.C.*, 772 F.2d at 1505-06 (tugboat propellers added dredged material by stirring up sediment that then settled on adjacent sea-grass beds); *United States v. Huebner*, 752 F.2d 1235, 1241-43 (7th Cir. 1985) (§ 404 permit required for farmer's use of earthmoving equipment to spread soil around wetlands); *United States v. Brace*, 41 F.3d 117, 127-29 (3d Cir. 1994) (same).

Indeed, a ruling that no "addition" exists unless dredged material has first been removed from United States waters – rather than relocated within those waters – would open a major loophole in the Act. Excavated material could be piped underwater in rivers and estuaries or pushed along the surface of wetlands, thus damaging or destroying those waters' hydrology and releasing toxic pollutants formerly immobilized in sediment – precisely the loss of aquatic integrity the Act was designed to prevent.

Finally, § 404(a)'s reference to discharge of dredged or fill material "at specified disposal sites" (*see* Pet. Br. 23) offers no support for petitioners' position. First, the *National Mining* concurrence cited by petitioners simply reads that statutory language as "suggest[ing]" "**either** a temporal **or** geographic separation between excavation and disposal." 145 F.3d at 1410 (Silberman, J.) (emphasis added). By joining the panel opinion, Judge Silberman expressed his agreement that the amount of geographic separation required is minimal, and that plowing qualifies as an addition. *See* p. 21, *supra*. Second, even if certain discharges were to be exempted from § 404(a) based on the phrase "specified disposal sites," they would still be subject to § 301(a)'s ban on "the discharge of **any** pollutant by **any** person." (Emphasis added.) Unlike § 404(a), § 301(a) does not contain the phrase "specified disposal sites."

V. PETITIONERS' EARTHMOVING ACTIVITIES, WHICH DESTROYED SOME UNITED STATES WATERS AND DAMAGED OTHERS, DO NOT FALL WITHIN THE ACT'S AGRICULTURAL EXEMPTIONS.

Because petitioners' earthmoving activities constitute discharges, they are prohibited by § 301(a), and thus

cannot proceed without a § 404 permit. Petitioners' attempt to avoid this result by invoking the § 404(f) exemptions must be rejected.

Section 404(f) includes a conditional exemption for enumerated activities, combined with a "recapture" provision confirming that "[a]ny discharge of dredged or fill material into the navigable waters incidental to **any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced**, shall be required to have a permit under this section." § 404(f)(2) (emphasis added).

"Read together, the two parts of Section 404(f) provide a narrow exemption for agricultural activities that have **little or no adverse effect** on the waters of the United States." *Brace*, 41 F.3d at 124 (emphasis added) (citing *Avoyelles*). The committee where § 404(f) originated emphasized that wetlands, bays, estuaries and deltas "are the Nation's most biologically active areas," and that "the systematic destruction of the Nation's wetlands is causing serious, permanent ecological damage." 1977 Legis. Hist. 644. Accordingly, the committee drafted § 404(f), not to provide a blank check for agricultural wetlands destruction, but on the contrary to impose "a **degree of discipline** over the extent to which these activities destroy wetlands or pollute navigable waters." *Id.* (emphasis added). In short, the exemption encompasses "those narrowly defined activities that cause **little or no adverse effects either individually or cumulatively**." *See* p. 6, *supra* (quoting legislative history) (emphasis added).

Consistent with all previous appellate decisions, the Ninth Circuit properly rejected petitioners' attempt to use

these exemptions to destroy various United States waters, and seriously damage others.

A. Draining and Destroying United States Waters Does Not Constitute "Plowing" Within the Meaning of § 404(f)(1).

Petitioners argue that their discharges fall within the § 404(f)(1)(A) exemption for "plowing." This argument is triply flawed.

First, the use of bulldozers equipped with four- to seven- foot-long tines and other attachments to break apart the subsurface clay pan of ranchland swales and streams and to fill those features in – thus destroying their aquatic characteristics – does not constitute "plowing." As the Corps' regulations confirm, plowing "does **not** include the redistribution of soil, rock, sand, or other surficial materials in a manner which **changes any area of the waters of the United States to dry land**. For example, the redistribution of surface materials by blading, grading, or other means to **fill in wetland areas** is not plowing." 33 C.F.R. § 323.4(a)(1)(iii)(D) (emphasis added).

Second, even if petitioners' activities could be considered plowing, § 404(f)(1)(A) does not encompass **all** plowing, but only plowing that constitutes "normal" agricultural activity. Thus, to fall within § 404(f)(1)(A), the activities "must be part of an established (i.e., on-going) farming, silviculture, or ranching operation." 33 C.F.R. § 323.4(a)(1)(ii). By contrast, "[a]ctivities which bring an area into farming, silviculture, or ranching use are not part of an established operation." *Id.* Indeed, even on previously farmed areas, the exemption is unavailable when the area "has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations." *Id. See also*

Brace, 41 F.3d at 126. Here, hydrological modifications **were** necessary to bring the swales and streams into the farming use.

Third, § 404(f)(1)(A)'s use of the term "plowing" must be read in the context of that same paragraph's reference to "**minor** drainage." (Emphasis added.) "The exemption for minor drainage does **not** apply to the drainage of swampland or other wetlands." 1977 Legis. Hist. 709 (Senate Report) (emphasis added). *Accord*, 33 C.F.R. § 323.4(a)(1)(iii)(C)(2) (minor drainage "does not include drainage associated with the immediate or gradual conversion of a wetland to a non-wetland"). Having completely converted some wetlands to dry land, and partly converted others, *see* pp. 7-8, *supra*, petitioners have gone well beyond what would qualify as "minor drainage." *See* Pet. App. 8 (Ninth Circuit: "by ripping up the bottom layer of soil, the water that was trapped can now **drain** out") (emphasis added). By using § 404(f)(1)(A) to authorize **major** drainage under the guise of "plowing," petitioners' untenable reading would defeat Congress's careful choice of the word "minor."

B. The Change from Ranched Wetlands to Farmed Uplands Is a Change in Use Triggering the § 404(f)(2) Requirement for a Permit.

Even if petitioners' discharges fit within § 404(f)(1), they still require a permit under § 404(f)(2). Petitioners do not and could not deny that their activities – which destroyed some swales and streams and seriously damaged others – caused the "flow or circulation" of United States waters to be "impaired," and "the reach of such waters" to be "reduced." § 404(f)(2). Instead, petitioners argue that their discharges were not "incidental to any activity

having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject." *Id.* This argument is untenable.

As the Ninth Circuit held here, "[c]onverting ranch land to orchards and vineyards . . . clearly" satisfies the changed use prong of § 404(f)(2). Pet. App. 10. This conclusion tracks the wording of § 404(f)(1)(A), which lists "farming" separately from "ranching," thus recognizing that they do **not** constitute a single use.

Moreover, here petitioners have not simply changed from a ranching use to a farming use – they have changed from a **wetland** ranching use to an **upland** farming use – and have done so by **destroying** waters of the United States. To exempt unpermitted drainage of United States waters, of a severity sufficient to convert those waters to uplands, would override Congress's express intent to exempt only "minor" drainage, § 404(f)(1)(A) – **not** "the drainage of swampland or other wetlands." *See* pp. 5-6, *supra* (quoting Senate Report). Moreover, by opening the door to wholesale conversions among various § 404(f)(1)(A) uses (*e.g.*, from forested wetlands to upland row crops), such an approach would fundamentally contravene Congress's intent that the § 404(f) exemptions encompass only "those narrowly defined activities that cause little or no adverse effects either individually or cumulatively," *see* p. 6, *supra* (quoting legislative history), as well as the Act's core purpose of restoring and maintaining the integrity of United States waters. § 101(a).

Thus, the Corps has properly provided that "[a] **conversion of a section 404 wetland to a non-wetland** is a change in use of an area of waters of the United States." 33 C.F.R. § 323.4(c) (emphasis added). *See also* Br. of American Forest & Paper Assn. at 6, 16-17 (**agreeing** with this interpretation, under which the

§ 404(f) exemption encompasses only activities that are "fully compatible with long-term operations that **maintain** the wetland's status and function," but not the "abuse of the exemption to **destroy** wetlands") (emphasis added). Petitioners do not and could not dispute that they effected such a conversion.

Petitioners themselves concede (at 33) that activities "done for the primary purpose of draining and drying out significant water bodies to convert them to uplands capable of being farmed" are not exempt. Here petitioners' activities included dragging four- to seven-foot long metal tines behind a bulldozer to rip the wetland soil in order to dry it out and convert the swales and streams to orchards and vineyards. This deep ripping was necessary to render the soil suitable for orchards or vineyards or, in other words, "capable of being farmed" for the new use of orchards and vineyards. Thus, petitioners' own characterization of § 404(f) would preclude exemption of their deep ripping activities.[5]

VI. PROTECTION OF WATERS THAT UNDISPUTEDLY CONSTITUTE "WATERS OF THE UNITED STATES" POSES NO FEDERALISM ISSUES.

Contrary to the suggestions of petitioners and *amici*, *see*, *e.g.*, Pet. Br. 45-46, application of the Act's permitting

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[5] Petitioners attempt to avoid this result through the untenable claim that the swales and streams were previously "subject" to cropping use within the meaning of § 404(f)(2), even if they had not been "subjected" to that use. *See* Pet. Br. 34. The argument simply ducks the fundamental point: the new use could not occur until petitioners had **first** destroyed United States waters by draining and filling them.

requirements as written poses no federalism issues. The observations of this Court in *SWANCC* concerning the federalism implications of regulating waters that do **not** qualify as "waters of the United States" under § 502(7) in no way support petitioners' and *amici*'s attempts to inject federalism concerns into the present case, which addresses only waters that concededly **do** qualify. Preventing damage or destruction of United States waters – including the swales and streams at issue here as well as the rivers, lakes, perennial streams, and estuaries threatened by petitioners' and *amici*'s sweeping arguments – is a proper focus of the federal government's regulatory power.

Indeed, invocation of federalism principles here would reduce them to a caricature. Surely the applicability of constitutionally driven clear statement canons cannot turn on such minutiae as whether excavated earth loses contact with the ground before being redeposited (Pet. Br. 21) or whether discharges are accomplished using a backhoe or bulldozer (*id.* 26). In either case, waters of the United States – in whose protection there is a legitimate federal interest – are destroyed or damaged.

Nor can the applicability of clear statement canons hinge on whether petitioners believe the activity at issue to be "traditional." *See* Pet. Br. 46. Aside from the obvious implausibility of positing a "tradition" of using modern, mechanized technologies unknown a hundred years ago (in this case, bulldozing wetlands with four- to seven-foot metal prongs), our environmental statutes would be eviscerated if "traditional" activities were insulated from regulation. After all, piping untreated sewage and industrial effluent into rivers was "traditional" before passage of the Act, but petitioners presumably would not argue that

federalism concerns are implicated by regulating those practices.[6]

"Traditional" or not, control of agricultural point source discharges is essential to preserving the integrity of United States waters. During the two decades prior to 1977, the annual rate of wetland loss in the conterminous United States was 458,000 acres – nearly all of it agricultural. 1983 Wetlands Trends Report at 3, 26. Without control of agricultural point source discharges, the rate of wetland loss could not have been reduced so dramatically in recent decades. *See* 2000 Wetland Trends Report at 9, 46 (from 1986 to 1997, the annual rate of wetland loss in the conterminous United States dropped to 58,000 acres, of which agriculture still accounts for 26%). Impacts on United States waters – whether from individually large projects, or from a collection of smaller ones – is a proper focus of federal regulatory authority. *See, e.g., United States v. Lopez*, 514 U.S. 549, 558 (1995) ("where a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence") (citation and emphasis omitted).

In short, where the waters at issue are undisputedly United States waters, federalism concerns require no

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[6] Equally if not more far-fetched, *amici* representing proponents of mining, roadbuilding, and other infrastructure projects seek to invoke federalism-driven clear statement canons based on the allegedly "routine" nature of those projects. Br. of Natl. Stone, Sand & Gravel Assn., *et al.*, at 16-19. *Amici* themselves describe these projects as "large scale," *id.* 12, and make no effort to deny their devastating impacts on United States waters. There is no basis for asserting that such projects qualify any less as "water pollution issues of national importance" (*id.* 17) than discharges from, say, a small town's sewage treatment plant, or a small factory.

narrowing interpretation of the Act – and in any event the plain meaning of the Act precludes any such narrowing. *See, e.g., Whitman v. American Trucking Assns.*, 531 U.S. 457, 471 (2001).

CONCLUSION

Petitioners' sweeping arguments threaten to produce major damage and destruction of wetlands, rivers, streams, lakes, and estuaries around the Nation – not just by agriculture, but by (*inter alia*) mining, channelization, commercial and residential development, and roadbuilding. Those arguments, so inimical to the Act's core purposes, are refuted by the plain meaning of its substantive provisions. Compliance with the permit system enacted by Congress is an essential tool for preventing this devastating environmental damage, and will not harm the legitimate interests of industry. *See, e.g., Huebner*, 752 F.2d at 1245-46 ("[W]e decline to be persuaded by [the farmers'] highly speculative prophecies of doom. . . . [P]roper compliance with the permit process is all that is required under the Clean Water Act to ensure that the use of the nation's wetlands proceeds with care."). The judgment below should be affirmed.

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Respectfully submitted,

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